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In The Supreme Court of the United States

WILLIAM DARDEN,

Petitioner,

v.

MARYBETH PETERS,
Register of Copyrights,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. When the Copyright Office refuses registration of a copyright based on a conclusion that the work lacks the constitutional prerequisite of "originality," has the Office made a finding regarding the existence of a property right contemplated under the Constitution that is subject to de novo review under the "contrary to constitutional right [or] power ..." provision of the Administrative Procedures Act, 7 U.S.C. § 706(2)(B)?

2. May the Copyright Office refuse to register a copyright based on its concluding that the authored elements viewed in isolation are not copyrightable and that when viewed in combination the work is simply "entirely typical"?

3. Is evidence of third party recognition of the distinctiveness of maps relevant for rebutting an assertion by the Copyright Office that the maps are mere representations of public domain maps lacking any sufficiently creative expression to warrant copyright registration?

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Petitioner William Darden respectfully prays the Court to issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in the above titled proceeding on May 24, 2007.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fourth Circuit is reported at 488 F.3d 277, 82 U.S.P.Q.2d 1751 (4th Cir. 2007), and is reprinted in the appendix hereto. (*See infra* p. 1a.)

The opinion on motion for reconsideration of the Court of Appeals for the Fourth Circuit is not reported. It is reprinted in the appendix hereto. (*See infra* p. 35a.)

The opinion of the United States District Court for the Eastern District of North Carolina is reported at 402 F. Supp. 2d 638, 77 U.S.P.Q.2d 1403 (E.D.N.C. 2005), and is reprinted in the appendix hereto. (*See infra* p. 22a.)

BASIS FOR JURISDICTION

On July 23, 2007, the United States Court of Appeals for the Fourth Circuit denied Petitioner's motion for reconsideration of the judgment and opinion entered May 24, 2007. The jurisdiction of the Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION AND STATUTES AT ISSUE

Article I, § 8, cl. 8, of the Constitution is at issue:

> The Congress shall have power ... To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

The statutes involved are the copyrightability provisions of the Copyright Act, 17 U.S.C. §§ 102, 103:

> § 102. Subject matter of copyright: In general
> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or ... (5) pictorial, graphic, and sculptural works; ...
>
> § 103. Subject matter of copyright: Compilations and derivative works
>
> (a) The subject matter of copyright as specified by section 102 includes compilations and derivative works, ...

> (b) The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material.

The review provisions of the Administrative Procedures Act, 5 U.S.C. § 706, are also at issue:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be—
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; [or]
>
> (B) contrary to constitutional right, power, privilege, or immunity; ...

> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

5 U.S.C. § 706.

STATEMENT OF THE CASE

The facts are relatively straightforward and undisputed. Petitioner William Darden created APPRAISERSdotCOM, an online advertising service that helps people locate real estate appraisers serving any county in the USA. (R. 91, ¶ 2.)[1] Mr. Darden uses a stylized map of the United States on the APPRAISERSdotCOM home page and stylized maps of individual states on the pages for the respective states. (*See* R. 80 – 83.) The maps were authored by a professional developer, Mr. Sean Pecor. Starting with digital maps from the United States Census, Mr. Pecor resized the maps, redrew "anti-aliased" lines to soften and to render the map lines more smoothly and aesthetically pleasing. Mr. Pecor then gave the redrawn maps three-dimensional effects by selecting and shading select portions of the maps. (R. 292, 294, 298, 311.) He selected and applied colors and fonts throughout the maps. He also created labeling and call-outs, selected what to label and call-out, and determined where to place these elements. (R. 117, ¶ 3.) An exemplar of one of the state maps may be viewed in

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[1] Citations to the Record refer to the Joint Appendix filed with the United States Court of Appeals for the Fourth Circuit on April 20, 2006.

the appendix hereto at page 57a. (R. 292 (same map).) Mr. Pecor assigned all of his copyrights in the maps to Mr. Darden in 1999. (*Id.* ¶ 4.)

Over the years, third parties recognized the maps as being unique and distinctive to Mr. Darden. (*See* R. 92 – 93, ¶¶ 4 – 7.) Consumers requested permission from Mr. Darden to use the maps. (R. 92, ¶ 4.) When competing websites copied Mr. Darden's maps, Mr. Darden's customers notified him because they thought he owned the other websites since they displayed his maps. (*See* R. 92 – 93, ¶¶ 4 – 7.) When asked, competitors acknowledged Mr. Darden's copyrights and removed his maps from their websites. (R. 92, ¶ 6.)

Given the ease and prevalence of "click and copy" on the internet, Mr. Darden decided to register the copyrights in his maps and in his web page design. In 2002, he submitted two applications for copyrights, one in the technical drawing copyright for his website, referred to as "APPRAISERSdotCOM" and the other for the maps on his website, referred to as "Maps for APPRAISERSdotCOM." Mr. Darden disclosed that the maps were derivatives of US Census maps and explained that the material added to the original work included "font and color selection; visual effects such as relief, shadowing, and shading; labeling; call-outs." (R. 287.)

The Office found that the maps lack the originality necessary to support a copyright claim and also denied registration for the website on grounds not relevant to this petition. (R. 119 – 20.)

Mr. Darden appealed the Office's refusal to register, explained that

> [t]he "creative spark" that makes Mr. Darden's maps eligible for protection are the overall design – the special combination of font and color selection; visual effects such as relief, shadowing, and shading; labeling; and call-outs. The information the map provide could easily be provided in other ways; thus, the author should be allowed to protect his creative efforts.

(R. 105.), and submitted the declaration of Mr. Pecor to set forth the creative efforts that went into authoring the stylized maps. (R. 117.)

The Office again refused registration, stating "[t]he changes made to the maps in these works amount to little more than layout or format, which as previously stated, are not copyrightable." (R. 96.) Exhausting his administrative appeals, Mr. Darden again requested reconsideration in a letter dated April 2003. (R. 86 – 93.) He clarified that the Office must look to the design of the maps as a whole and not focus on isolated elements. (R. 87.) Mr. Darden also explained that his maps are copyrightable since the information they provide could be provided in numerous ways. (*Id.*) In an accompanying declaration, Mr. Darden explained that consumers recognize the distinctiveness of his stylized maps. (R. 89, 91 – 93.) The Office denied Mr. Darden's second appeal. (R. 68 – 79.) In viewing the elements of the maps in their entirety, the Office concluded, "The arrangement of the names, call-outs, shading,

and color is 'entirely typical' and does not establish a basis for establishing the requisite level of creative authorship necessary to sustain a copyright in a map or any other work." (R. 75.) The Office did not explain how or provide evidence to demonstrate why it determined that Mr. Darden's stylized maps were "entirely typical." The Office also categorically rejected the relevance of third party recognition of the maps. (R. 76.)

Mr. Darden appealed the Office's decision to the United States District Court for the Eastern District of North Carolina, pursuant to 17 U.S.C. § 701(e) and 5 U.S.C. § 702 et seq. In deciding cross-motions for summary judgment in favor of the Office, the trial court rejected Mr. Darden's argument that the Office's analysis of "originality" should be subject to de novo review, acknowledged that the Constitution empowers Congress to protect copyrights in original works and that Congress has vested such power in the Register of Copyrights, and that the Office did not abuse its discretion in refusing registration. (A. 22a – 34a.)

In the course of affirming the trial court, the Fourth Circuit acknowledged that constitutional questions that arise during APA review fall expressly within the domain of the courts under the APA. The panel then held that "[c]opyright is solely a creature of statute; whatever rights and remedies exist do so only because Congress provided them. ... Thus, as there is no constitutional right to copyright registration, the Register's refusal to register ... cannot be 'contrary to constitutional right' as it must be for § 706(2)(B) to apply." (A. 12a.) The court also

found that elements in the maps resemble the list of examples of uncopyrightable works set forth in 37 C.F.R. § 202.1(a) (A. 18a), and that evidence of marketplace recognition of the maps "is the hallmark of trademark law, not copyright." (A. 19a.) Finding no abuse of discretion, the court affirmed.

REASONS FOR GRANTING THE WRIT

1. The Fourth Circuit's holding that the Copyright Office's analysis of copyright originality did not present an issue of constitutional analysis subject to review under 15 U.S.C. § 706(2)(B) is contrary to the Court's holdings in *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340, 347 (1991) and *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53 (1884).

The Constitution empowers Congress to protect the "writings" of authors, the right of such protection recognized in the form of copyright. Congress has long since decided that "maps" are "writings" for purposes of copyright protection. The issue contested before the Copyright Office was whether Mr. Darden's maps are copyrightable or, in constitutional parlance, whether the maps constitute "writings" that may be protected. The Court has long recognized that the definition of what constitutes a copyright is ultimately a constitutional question and that the Constitution mandates a work be an "original" work of authorship to warrant copyright protection. When the Copyright Office makes determinations of copyrightability based on the issue of originality, it conducts a constitutional

analysis that should be subject to de novo review under 15 U.S.C. § 706(2)(B).

The property right of copyright derives directly from the constitutional grant to Congress of the power to protect an author's "writings." To be protected by copyright, the Constitution requires "writings" to be sufficiently original. "Originality is a constitutional requirement." *Feist Publications, Inc. v. Rural Telephone Service Co.*, 499 U.S. 340, 346 (1991). The Court has repeatedly explained that the base requirement for copyright is "originality" and that the Constitution mandates this standard. *Id.* at 345 – 47; *accord Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239 (1903); *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884); *Alfred Bell & Co. v. Catalda Fine Arts*, 191 F.2d 99, 102 – 03 (2d Cir. 1951); *J.L. Mott Iron Works v. Clow*, 82 F. 316 (7th Cir. 1897). As far back as 1884, the Court stated that whether a work was copyrightable constituted a difficult question of *constitutional* law. *Burrow-Giles Lithographic*, 4 U.S. at 280. More recently, the Court thoroughly explained the constitutional basis for copyright originality in its analysis in *Feist*. The Copyright Office's analysis of copyright originality presented a question of constitutional law.

Mr. Darden disputes that the Office properly decided the constitutional prerequisites for copyright. A copyright is, per se, a right. Section 706(2)(B) of the APA requires de novo review of agency decisions that involve a constitutional right. Mr. Darden believes his maps contain- the "originality" required by the Constitution. Courts

should not afford deference to the Copyright Office's determination of whether constitutional prerequisites have been satisfied for purposes of copyright.

The Fourth Circuit misconstrued Darden's § 706(2)(B) argument. The Panel described Darden as arguing that the constitutional right at issue was his right to register his works. (A. 11a – 12a.)

The constitutional "right" disputed in this case relevant to § 706(2)(B) is not a registration right or any other individual right. Darden does not argue he has an individual right under the Constitution to register a copyright. The "right" implicated is a property right, specifically, whether constitutional jurisprudence recognizes Darden's "writings" as sufficiently "original," i.e., whether a copyright exists. The word "right" in § 706(2)(B) is not limited to "individual" rights but involves any right under the Constitution, to include the property right the Constitution recognizes as original writings, which Congress may protect and with regard to maps has chosen to protect.

The Fourth Circuit further misstated the nature of copyright, asserting "[c]opyright is *solely* a creature of statute." (A. 12a (emphasis added).) To the contrary, copyright is a right born directly out of the Constitution. Whether and to what extent the laws protect copyright is left to the discretion of Congress. Congress exercised that power and delegated certain authority to the Copyright Office. When the Copyright Office invokes constitutional

standards for determining the existence of copyright, its determinations should be subject to de novo review.

In its brief before the Fourth Circuit, the Government took the position that courts always afford the Office deference regarding the denial of a registration for lack of copyrightable subject matter. The Fourth Circuit's holding implicitly states that copyright registration decisions should always be reviewed under an abuse of discretion standard. The first commentary on the case draws the same conclusion. *See* James E. Hawes, et al., Copyright Registration Practice § 22:10 n. 1.5 (2nd ed. (database) 2007) ("A judicial review of the Register's refusal to register a claim is brought under the Administrative Procedure Act based on an abuse of discretion and it cannot be reviewed de novo.")

There are a line of cases that hold the Office to an abuse of discretion review. Upon scrutiny, however, there is an important distinction in nearly all these cases. Congress decided where and to what extent to extend copyright protection. By doing so, Congress set forth subject matter that may be copyrighted. For example, Congress extended copyright protection to maps but not to useful articles, i.e., "industrial designs." *See* 17 U.S.C. § 101 (definition for "Pictorial, graphic, and sculptural works"). The Copyright Office was left to interpret what these areas of subject matter included.

There has been significant litigation regarding the definition of where Congress drew the lines of copyrightable subject matter under the Copyright

Act, such as for "useful articles." *See, e.g., OddzOn Prod., Inc. v. Oman*, 924 F.2d 346 (D.C. Cir. 1991); *Eltra Corp. v. Ringer*, 579 F.2d 294 (4th Cir. 1978); *Esquire, Inc. v. Ringer*, 591 F.2d 796 (D.C. Cir. 1978). In such litigation, courts properly afford the Copyright Office discretion in construing the subject matter boundaries set by Congress, such as defining what constitutes a "useful article."

This is not a case contesting how the Copyright Office construed "useful articles," what constituted a "map," or any other statutory line set by Congress. There is no dispute that a map is copyrightable subject matter and that Darden submitted maps for registration. This is a dispute over the Office's decision that Darden's maps lacked sufficient originality. The prerequisite of originality derives from the Constitution and necessarily involves a constitutional question.[2] *See Feist*, 499 U.S. 346 – 47.

There is one circuit case, over two holdings, that specifically addresses the standard of review for the Office's denial of registration based on a finding of insufficient originality. *See Atari Games Corp. v. Oman*, 888 F.2d 878 (D.C. Cir. 1989); *Atari Games Corp. v. Oman*, 979 F.2d 242 (D.C. Cir. 1992). In the *Atari* holdings, through then Judge Ginsberg, the D.C. Circuit stated it was giving deferential review to the Office's analysis of "originality," but in practice the court gave no deference. Importantly, the frustrated applicant, *Atari*, only pursued appeal

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[2] "[I]t seems self-evident that Congress could not constitutionally create a lower standard of originality ...." Howard B. Abrams, The Law of Copyright § 2:2 (Oct. 2006).

on the abuse of discretion standard of 5 U.S.C. § 706(2)(A). *Atari Games*, 888 F.2d 879. The circuit court twice rejected the Office's proffered analysis of originality. Aside from one concurring opinion, the court gave little defense of or analysis of the deferential standard of review. It was the only standard Atari pursued. The concurring opinion offered a pragmatic rationale for that standard. *See Oman*, 888 F.2d at 886 – 87 (Silberman, J., concurring). That "originality" is a constitutional requirement for copyright was not raised, let alone analyzed in the opinions.

"Originality" is a constitutional pre-requisite for copyright protection. The Constitution imposes the requirement. When the Copyright Office decided that Darden's works did not exhibit sufficient originality, the Office decided that a requirement imposed by our Constitution had not been satisfied. An incorrect analysis of a constitutional property right is "contrary to constitutional right." Review should be had under 15 U.S.C. § 706(2)(B).

2. The Fourth Circuit's affirming that the Copyright Office may refuse registration for lack of originality based on a conclusion that the authored elements when viewed in combination are "entirely typical" misapplies the Court's holding in *Feist Publications v. Rural Telephone Service Co.* and conflicts with the District of Columbia Circuit's holdings in *Atari Games Corp. v. Oman*.

In its analysis, the Copyright Office reviewed individual elements of Darden's maps, and concluded

that each element, in isolation, was not copyrightable. The Office then acknowledged its duty to analyze the elements as a whole, and, while citing *Feist*, immediately concluded that the arrangement of these elements is "entirely typical" and did not rise to the level of creative authorship necessary to sustain a copyright. (R. 74 – 75.) No where in the administrative record, at the District Court, or in its appeal briefs before the Fourth Circuit did the Office explain why the elements when taken as a whole are "entirely typical."[3] Nonetheless, the Fourth Circuit found that the Copyright Office cited uncopyrightable elements in the maps and held that additions such as color, shading, and labels "fall within the narrow category of works that lack even a minimum level of creativity ..." similar to the standards set forth in 37 C.F.R. § 202.1(a). (A. 18a.)

In *Feist*, the Court found the works at issue "entirely typical" and dedicated several paragraphs to explaining the basis for this conclusion. *See Feist*, 499 U.S. at 362. Read in context, the Court's use of "entirely typical" does not appear intended to set a legal standard for evaluating originality. Rather, the Court observed that the phone book pages at issue in that case appeared the same as telephone listings found anywhere else. Earlier in the opinion, the Court emphasized that the uniqueness or novelty of a work is irrelevant for purposes of determining originality. "Originality does not signify novelty; a

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[3] To the contrary, the only record evidence was that the maps were not typical, that customers and competitors alike acknowledged the maps as unique and proprietary to Mr. Darden. (R. 92 – 93.)

work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying." *Feist*, 499 U.S. at 345.

The Office erred in using "entirely typical" as its standard for evaluating the elements contributed to Mr. Darden's maps in combination. The Fourth Circuit erred by holding that the Office's analysis of the individual elements was sufficient.

From a practically infinite palate of potential colors, the Darden maps reflect a particular shade of blue, a different color for the political boundaries, another color for the shading, yet another shade of blue for water, callout boxes in black, and the use of white for font coloring. (*See* R. 292 – 346; A. 57a.) The author selectively used and creatively placed shading throughout the images. (*See, e.g.*, R. 292 (A. 57a), 294, 298, 311.) He determined when to selectively use callouts and where to place them, and in limited instances when and where to place numbered reference notes. (*See* R. 292 – 346.) The author used and placed the enumerated reference notes and the callout boxes in a balanced and creative manner. (*See, e.g.*, R. 292, 298, 300, 322, 340, 341.) He redrew the boundaries to soften the maps' appearance. (R. 116.) The combination of all these elements over dozens of maps creates a distinctive and unique creative effort. (*See* R. 292 – 346.) The Darden maps are unique and distinctive, and the countless combinations of the various elements over dozens of images makes them substantially more creative than an alphabetical listing of names, the object of analysis in *Feist*. The

analysis condoned by the Fourth Circuit provides no guidance or illumination as to why the combination of these elements is not copyrightable. Further, the Fourth Circuit's holding on the Office's analysis of a combination of elements contradicts holdings from the District of Columbia Circuit.

The D.C. Circuit rejected and remanded the same type conclusory analysis on the copyrightability of a combination of elements. The Copyright Office refused to register the copyright in Atari's video game BREAKOUT. The video images consisted of a wall comprising colored rectangles, a rectangular shaped paddle, and a square ball. Sounds and tones accompanied the playing of the game. The Copyright Office (twice) refused registration, claiming that the work "as a whole" lacked sufficient originality to warrant registration; its analysis consisted of explaining why the individual elements lacked sufficient originality and were dictated by functional concerns. *Atari Games*, 888 F.2d 879 – 80.

In the first *Atari* holding, then Judge Ginsberg writing for the court expressed concern that the Office fixated on a component-by-component analysis of Atari's videogame. The court reminded the Office that, while component parts of a work may be neither original nor copyrightable, the elements in combination may create a separate entity that is both original and copyrightable. *Atari*, 888 F.2d at 882 – 83. The court further reminded the Office that the "level of creativity necessary and sufficient for copyrightability has been described as 'very slight,' 'minimal,' and 'modest.'" *Id.* at 883. The court was

concerned that the Office's decision did not harmonize with prior office actions and court rulings on the creativity threshold. *Id.* at 884. In reversing the trial court's affirmance, the court stated,

> [w]e are unable to detect from the final decision before us the standard the Registrar is using to differentiate material that cannot constitute copyrightable subject matter and therefore should not be registered, from material that may be copyrightable, although perhaps meriting only "thin" protection when the character of its "expression" is tested in an infringement suit.

Id. at 886.

In the second *Atari* holding, which then Judge Ginsburg referred to as "the replay of the match," the court again reversed the district court for being too deferential to the Office's second refusal to register Atari's works, this time holding that the Office's rejection of the works was unreasonable in light of "the Supreme Court's instruction that 'the requisite level of creativity [for copyrightability] is extremely low.'" *Atari*, 979 F.2d at 243 (citing *Feist*). The court expressed its concern that the Office "may have" focused too closely on individual details of the submitted work. *Id.* at 246. The court reminded the Office that a distinguishable variation in the arrangement and manner of presentation of public domain elements was entitled to copyright protection, *Id.* at 246, that the vast majority of works make the copyright grade, and that it is not the Office's task "to shape the protection threshold or

ratchet it up beyond the 'minimal creative spark required by the Copyright Act and the Constitution.'" *Id.* at 247 (quoting *Feist*, 499 U.S. at 363). The Office's assertion of "entirely typical" is the same talismanic type reasoning that the D.C. Circuit rejected in its post-*Feist* holding in *Oman*, 979 F.2d 246 – 47. The Fourth Circuit's deference to the Office's conclusory review of Darden's map elements in combination cannot be reconciled with the D.C. Circuit's holdings requiring the Office to articulate the standard it used for finding a combination of elements lacked sufficient originality.

3. The Fourth Circuit erred as a matter of law by holding that marketplace acknowledgement of the uniqueness of Darden's maps is irrelevant to the issue of copyright originality.

The Fourth Circuit affirmed the Office's refusal to take into account evidence that consumers recognized Darden's maps when used by others, that others asked Darden to license the use of his maps, and that competitors removed his maps from their websites when asked. (R. 92 – 93; A. 19a – 20a.) The Fourth Circuit state that third party association of the maps with Darden "is an indication of commercial success over time, not originality." (A. 19a – 20a.) The Fourth Circuit's reasoning fails scrutiny as it asserts that recognition of an image in commerce can only be attributable to commercial success over time, or in trademark terms, acquired commercial strength. In support of its holding, the Fourth Circuit relied upon the Court's holding in *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763,

768 – 69 (1992). That portion of the holding established that there exists two basis for evaluating the strength of trade dress: inherent distinctiveness and acquired distinctiveness. The holding does not discuss whether or to what extent these principals may overlap with issues relevant to copyright. The Fourth Circuit held, without any explanation, that recognition of Darden's maps was attributable to "commercial success over time," meaning attributable to "acquired commercial strength" and not due to anything inherently distinctive about the maps.

Mr. Darden's maps are used on websites to help people find appraisers in certain geographic areas. There is nothing remarkable or even noteworthy about using maps on the internet to represent geographic areas. Regardless, there is something distinct enough about Mr. Darden's maps that people recognize the maps as belonging to Mr. Darden when they see the maps on another website being used for this ordinary function. The fact that consumers recognize Mr. Darden's maps provides compelling evidence that these consumers find Mr. Darden's maps distinguishable and recognizable.

The evidence of marketplace recognition rebuts the Office's claim that Mr. Darden's maps contained insignificant variations from the public domain works. (R. 74.) If the difference between Darden's maps and the public domain maps were insignificant, one would not expect to find third parties readily identifying Darden's maps on third party websites. In the context of *Feist*, one would not expect consumers to recognize a copy of

telephone listings as originating from one publisher versus another. In the context of *Oman*, to this day people recognize the BREAKOUT images.

This evidence of third parties recognizing Darden's maps demonstrates that the artistic contributions to the maps were not trivial, but instead they make the maps a distinguishable variation from the prior work. As derivative works distinguishable from the previous works, Mr. Darden's maps are copyrightable. *See Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F.2d 99, 102 – 03 (2d Cir. 1951) ("All that is needed ... is that the 'author' contributed something more than a 'merely trivial' variation"); *Gerlach-Barklow Co. v. Morris & Bendien, Inc.*, 23 F.3d 159, 161 (2d Cir. 1927) ("While a copy of something in the public domain will not, if it be merely a copy, support a copyright, a distinguishable variation will"); *Imperial Laces Inc. v. Westchester Lace Inc.*, 1998 WL 830630 (S.D.N.Y. Nov. 30, 1998) (finding valid copyright in derivative lace pattern) (R. 434 – 36.); *Godinger Silver Art Co. v. International Silver Co.*, 1995 WL 702357 (S.D.N.Y. Nov. 28, 1995) (finding derivative silver pattern to be protectible as it was not a "mere translation") (R. 437 – 40.) The Fourth Circuit's holding that public recognition of the distinctiveness of a design is not relevant to the issue of "originality" creates an artificial and improper barrier between trademark and copyright evidence.

CONCLUSION

This matter presents important and converging questions of intellectual property, administrative, and constitutional law. Unlike many cases in these areas, the record in this case is concise and clear, and the facts largely uncontested.

A constitutionally established property right has been denied a citizen of the United States by trial and appellate courts refusing to review *de novo* a constitutional standard. William Darden created a map and was denied copyright protection by the Copyright Office for failure to meet the originality requirement. The originality standard did not originate with Congress or the Copyright Office. Rather, originality is a constitutional standard. Here both the trial court and the appellate court held that Mr. Darden did not have a right of *de novo* review. Instead, on this constitutional standard both courts deferred to the Copyright Office's holding and reviewed the originality requirement under an abuse of discretion review.

The Supreme Court in *Feist* and other cases determined the constitutional standard for copyrightability. It is very minimal. Originality is most often met if the work is simply not a copy of someone else's work. The Copyright Office, in its bureaucratic setting, formulates highly mechanical and rigid requirements for originality that, in practice, surpass the constitutional standard as defined by the Court. In addition to this, applying these rigid tests that have nothing much to do with the standard of originality as articulated by the

Court based on a constitutional analysis, gives rise to subjective evaluations by personnel in the Copyright Office. This framework for testing originality in the Copyright Office is ripe for abuse. A standard of review based on an abuse of discretion will not provide appropriate constitutional review.

The import of this decision extends beyond Mr. Darden. The rise of intangible assets in this country only continues to increase. From e-commerce to entertainment to software, and throughout most areas of business and academia, copyright provides a foundation for the modern economy and information age. Arguably, the ease of copying outpaces the recent increase in the prominence of copyright. The Copyright Office stands at the gateway for regulating the registration and thus the enforcement and management of copyright. This case clarifies the nature of what constitutes copyright, the extent to which the courts must defer to the Copyright Office's determination of what satisfies the constitutional requirement of "originality" and what duty the Copyright Office has in evaluating derivative works. These questions are important to all parties that produce and want to protect copyrightable content. The Fourth Circuit's opinion fails to hold accountable a most important regulatory agency and strongly conflicts with the precedent of this Court and the D.C. Circuit on fundamental issues of copyright. Already, commentators are citing the Fourth Circuit and repeating its erroneous holding. Darden respectfully prays for the granting of a writ so that these arguments may be heard and addressed by the Court.

Respectfully submitted this the 22nd day of October, 2007,

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